79-127

IN THE

Supreme Court of the United States

October Term 1979

No. 78-1402

BLANCHE HARRIS and LEON L. MOORE, JR.,
trading as LEON L. MOORE OIL COMPANY,
Petitioners,

v.

ATLANTIC-RICHFIELD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Blanche Harris and Leon L. Moore, Jr., the petitioners herein, through counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in the above-entitled case on March 23, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is appended hereto as Exhibit "A". The memorandum of decision of the United States District Court for the Eastern District of North Carolina, dated March 23, 1979, is unreported, and is appended hereto as Exhibit "B". The judgment of the United States District Court for the Eastern District of North Carolina dated March 23, 1978 is appended hereto as Exhibit "C".

JURISDICTION

The judgment of the United States Court of Appeals (Exhibit "A", infra) was entered on March 23, 1979. A timely petition for rehearing was denied on April 30, 1979, and is appended hereto as Exhibit "D".

The jurisdiction of this Court is invoked under Title 28, U.S.C., §1254(1).

QUESTIONS PRESENTED

1. Whether there is a genuine issue of material fact as to whether or not Atlantic-Richfield's withdrawal from marketing activities in North Carolina in 1973 was pursuant to a deliberate market division plan in violation of §1 of the Sherman Antitrust Act, Title 15, U.S.C., §1, such as to preclude summary judgment on behalf of Atlantic-Richfield.

2. Whether there is a genuine issue of material fact as to whether Atlantic-Richfield breached its overall dealer agreement with the petitioners in withdrawing from marketing activities in North Carolina in 1973 and closing its North Carolina supply terminals, such as to preclude summary judgment on behalf of Atlantic-Richfield.

3. Whether or not the North Carolina Unfair Trade Practices Act, North Carolina General Statutes, §75-1.1, and its provision for treble damages, North Carolina General Statutes, §75-16, is a penalty statute and therefore barred by North Carolina's one-year statute of limitations for penalty statutes, §1-54(2).

STATUTES INVOLVED

1. **Title 15, U.S.C., §1:** Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal: Provided, that nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law

or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

2. **North Carolina General Statutes, §75-1.1** (Vol. 2C, p. 180): (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. (b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State. (c) Nothing in this section shall apply to acts done by the publishers, owner, agent or employee or a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical dor radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service. (d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

3. **North Carolina General Statutes, §75-8.** (Vol. 2C, p. 187): Where the things prohibited in this Chapter are continuous, then in such event, after the first violation of any of the provisions hereof, each week that the violation of such provision shall continue shall be a separate offense.

4. **North Carolina General Statutes, §75-16.** (Vol. 2C, p. 189): If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or coporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

5. **North Carolina General Statutes, §1-54(2).** (Vol. 1A, p. 115): Within one year an action or proceeding — (2) Upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

STATEMENT OF THE CASE

A. Course of Proceedings Below:

This action was originally instituted by the petitioners on April 28, 1972 on a complaint alleging anticipatory breach of written, oral and implied contracts and fraud relating to the potential effect on their business as distributors of petroleum products for Atlantic-Richfield of Atlantic-Richfield's plan of withdrawal from operations in the southeastern United States, publically announced on May 24, 1971, and subsequently implemented in April, 1973. Thereafter, settlement negotiations were commenced and sixteen (16) separate 90-day extensions of time were entered into while the parties negotiated, the last such extension having been filed on August 6, 1973. Settlement negotiations terminated, and the respondent filed its answer and counterclaim on September 6, 1974. Original counsel for the petitioners withdrew and new counsel was substituted on September 17, 1974. The petitioners moved to file an amended complaint, which was allowed by the Court as of January 15, 1975.

The amended complaint changed the anticipatory breach of contract action to actual breach and added claims for violations of Sections 1 and 2 of the Sherman Antitrust Act, Title 15, U.S.C., §1 and §2 and the North Carolina Unfair Trade Practices Act, North Carolina General Statutes, §75-1, *et seq.*, alleging that the pull-out was the result of a deliberate market division scheme between the big oil companies. On February 24, 1975, Atlantic-Richfield filed an answer to the amended complaint and a counterclaim for $189,626.23 allegedly owed to it by the petitioners on an open account for goods sold and delivered. On February 22, 1977, Atlantic-Richfield filed a motion for summary judgment against the petitioners' claim and for judgment on the respondent's counterclaim, which was allowed on March 23, 1978.

B. The Evidence:

The Leon L. Moore Oil Company, operated by the petitioners, is a family business which had existed prior to the institution of this legal action for approximately forty (40) years, dealing first with the Atlantic Refining Company, and then with Atlantic-Richfield after the 1966 merger between the Atlantic Refining Company and Richfield Oil.

On April 29, 1967, the petitioners executed three (3) distributorship agreements, effective May 1, 1967, establishing a fifteen (15) year business relationship. In addition to the three (3) written distributorship agreements, there were other written documents including a $70,000.00 note, a guaranty agreement, and various lease and lease/back financing arrangements which were assigned to the First Pennsylvania Bank and Trust Company. The three (3) product distributorship agreements dealt with gasoline, heating oil and automotive lubricants. The agreements provided for the delivery of "Atlantic Gasoline," "Atlantic Imperial Gasoline," "Atlantic Kerosene," "Atlantic Furnace Oil Medium," and "Atlantic Automotive Lubricants." The gasoline agreement provided further as follows:

> Deliveries hereunder shall be made in tank car or truck transport in approximately equal monthly quantities to the following bulk plant or plants of the buyer: Greenville, North Carolina.
>
> * * * * *

Atlantic will accept from buyer assignment of accounts which result from retail credit sales made by buyer at its own service station retail outlets or by service station dealers purchasing Atlantic petroleum products from buyer and will pay or credit buyer of the amount thereof, subject to the terms and conditions outlined by Atlantic from time to time.

In spite of the contract provisions, after the closing of the respondent's Wilmington supply terminal in April of 1973, the petitioners were required to purchase Shell, Mobil and Union products from supply terminals in Richmond and Chesapeake, Virginia. Freight allowances in the amount of $24,018.00 were disallowed for one (1) pertinent year, and Leon L. Moore, Jr. testified that Atlantic had discontinued sending out credit cards.

The preliminary Federal Trade Commission staff report on its investigation of the petroleum industry (Serial No. 93-15) prepared for the use of the committee on Interior and Insular Affairs of the United States Senate, reported at page 40 that a market restructuring had taken place between the major oil companies, which was accompanied in a number of instances by public announcements of the plans of a particular company. For instance, in October, 1972, Gulf Oil announced plans to sell or close 3,500 service stations in the upper midwest and northwest; in June, 1972, Phillips Petroleum announced plans to withdraw service station and home heating oil operations in the northeast; Sun Oil Company announced in February, 1973 that it was withdrawing from marketing operations in eight (8) midwestern states. Atlantic-Richfield's decision to withdraw from the southeast was accompanied by a press release dated May 24, 1971, but its actual implementation did not occur until April of 1973. The Federal Trade Commission Report, at page 28, concluded that the behavior of the major oil companies should properly be characterized as cooperative, rather than competitive, with respect to marketing gasoline and other activities.

The affidavit of Dr. James H. Scheiner, Associate Professor in the Graduate School of Business Administration at Duke University, reported the following findings and conclusions resulting from his study of the market division situation:

12. That the market share data published in the Lundberg Surveys for the years 1970, 1971, 1972 and 1973, show the following market division trends for three of the companies that formerly were a part of the Standard Oil Trust:

    Standard Oil of Indiana (Amoco) — withdrawal from far west, concentration in midwest

    Atlantic-Richfield — withdrawal from southeast and from nation generally except from concentration in the far west and northwest

    Exxon — withdrawal from the northwest and midwest, with heavy concentration in the southeast

*****

13. That a de facto market division has taken place between the major oil companeies between 1970 and 1973, with the data being published for the first time in September, 1974, which had the effect of reducing competition between the major eight oil companies, increasing their profitability dramatically in a comparison between the first half of 1973 net earnings and the first half of 1974 net earnings, according to the attached schedule.

14. That in my opinion, the de facto market division between the major oil companies attested to in this Affidavit, based on the history of the companies, business associations which are a matter of public record, and the reputation for control and ownership that exists in the business community, was the result of a deliberately conceived and executed plan and was for the purpose of reducing competition and its costs, and to gain greater control of the market and to increase profits.

Dr. John W. Wilson, former Chief of the Division of Economic Studies of the Federal Power Commission, testified before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the United States House of Representatives on February 25, 1976 and came to conclusions similar to those of the Federal Trade Commission and Dr. Scheiner. (Serial No. 48, pp. 244-418) Dr. Wilson's testimony went on to detail the extensive joint partnership interests between the oil companies. Dr. Wilson further stated that the structure of the modern petroleum industry can be traced back to the original Standard Oil Trust, of which the Atlantic Refining Company was an original part.

REASONS FOR GRANTING WRIT

A. **Important Public Question:**

Whether or not the oil companies, and particularly Atlantic-Richfield, have engaged in conspiratorial activity to divide markets, reduce competition and increase prices is a question of present consuming public interest. A substantial segment of the public believes that the current shortages and high prices are the result of conspiratorial market and production arrangements. If this is true, something should be done about it, and if it is not true, there should be a judicial determination of that fact,on the merits, after a plenary trial. The ability of our government, and of our society, to deal with the questions of conservation, rationing, regulation or deregulation, and import controls may depend upon facing the issues of competition and conspiracy, and dealing with them or laying them to rest.

B. **Conflict with Decision of this Court:**

The trial Court's memorandum of decision contained the following statements:

> Neither in their allegations nor their proof have plaintiffs named a co-conspirator, nor is there any allegation or proof of a contract or combination between the defendant and any other party concerning the reasons for defendant's withdrawal from doing business in the southeastern states.
>
> * * * * *
>
> In their depositions, the plaintiffs concede that they have no personal knowledge of any agreement or conspiracy between defendant and any other party, and the closest they came to substantiating the "information and belief" on the basis of which the antitrust charges been alleged in the complaint is their reference to certain newspaper stories. Such evidence, of course, is not admissible for consideration in opposition to a summary judgment motion.

In the first place, the trial Court makes no reference to the affidavit of Dr. James H. Scheiner, the transcript of the testimony of Dr. John W. Wilson, and the Federal Trade Commission's Staff Report which were filed in the record in this case subsequently to the deposition testimony to which the Court refers.

The courts have long recognized that an express agreement, formal contract or direct evidence of a conspiracy by a participant is not necessary in order to establish a combination in restraint of trade. This Court stated in *Interstate Circuit, Inc. v. United States*, 360 U.S. 208 (1939), as follows:

> Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

The Court stated again in *United States v. Parke, Davis and Co.*, 362 U.S. 29 (1960) at page 44, as follows:

> ...Judicial inquiry is not to stop with a search of the records for evidence of purely contractual ar-

> rangements. The Sherman Act forbids combinations of traders to suppress competition. ...Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did, rather than the words they used....

Beatrice Foods Co. v. United States, 312 F. 2d 29 (1963), recognized that in antitrust cases direct testimony of an unlawful agreement is usually not available, and the court is compelled to rely on inferences drawn from actual conduct. Among the factors considered relevent in this particular case were an unnatural bidding pattern and an almost equal division of the bid awards.

In the present case, we have the major oil companies (who were specifically designated by name in the affidavits, transcript of testimony and report filed with the record in this case, contrary to the trial judge's statement) acting during the period from 1971 to 1973 to concentrate their marketing activities in different regions of the country, following public announcements of their intentions. Two cases, *Eastern States Retail Lumber Dealers Assoc. v. United States*, 234 U.S. 600 (1914) and *American Column Co. v. United States*, 257 U.S. 377 (1921) held that the dissemination of trade and marketing information to competitors is a fact from which a combination or agreement in restraint of trade may be inferred. Atlantic-Richfield's change of marketing strategy was announced in a public press release on May 24, 1971, but not implemented until April of 1973 after a number of other major oil companies had made similar public announcements.

C. **Sanction of Departure from Usual Course of Judicial Proceedings:**

The trial Court stated that the antitrust material submitted by the petitioners in opposition to the respondent's summary judgment motion were read" . . . as time has permitted. . . ." From this statement, and from the trial Court's erroneous statements regarding the substance of the evidence in the record, an inference arises that the Court did not read or consider the material submitted in opposition to Atlantic's summary judgment motion. In this posture, the case stands for the proposition that if a court has not the time to read the materials the plaintiff must lose.

D. **Conflict with Applicable State Law:**

In holding that the petitioners' claim for relief grounded in the North Carolina Unfair Trade Practices Act, North Carolina General Statutes, §75, is barred by the one-year statute of limitations, North Carolina General Statutes, §1-54(2), the Courts have overlooked the fact that under the provisions of North Carolina General Statutes, §75-8, the statute of limitation serves merely to limit the period for which the petitioners are entitled to plead and prove their damages and does not bar the cause of action itself because the violations are deemed to be continuing violations and a new cause of action is created each week that a violation continues. At law, the petitioners are entitled to prove their damages arising after January 15, 1974, (one-year prior to the filing of the amended complaint on January 15, 1975).

Furthermore, the trial Court has made a blatant error, ratified by the Court of Appeals, in holding that North Carolina General Statutes, §75-1.1 is a penalty statute, and thus barred by the one-year statute of limitation in North Carolina General Statutes, §1-54(2). The Supreme Court of North Carolina has explicitly held in *State Ex. Rel. Edmisten v. J. C. Penney Co.*, 292 N.C. 311, 233 S.E. 2d 895 (1977), as follows:

> "Defendant contends the statute is penal in nature and thus, must be strictly construed. The State, on the other hand, insists the statute is remedial and must, therefore, be broadly construed. We find neither of these views persuasive.

No decision of the Supreme Court of North Carolina has ever applied the one-year statute of limitations contained in North Carolina General Statutes, §1-54(2) to North Carolina General Statutes, §75-1.1, *et seq.*

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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Of Counsel:

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CERTIFICATE OF SERVICE

The undersigned, William V. McPherson, Jr., hereby certifies that he is licensed to practice law in the Supreme Court of North Carolina and in the United States Supreme Court.

That on July _____, 1979, he served all parties required to be served, by depositing three (3) copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, in a United States Post Office, with postage prepaid, properly addressed to Counsel of Record for the respective parties at their addresses as follows:

Richard W. Ellis
Smith, Moore, Smith, Schell & Hunter
P.O. Box 21927
Greensboro, North Carolina 27420

William V. McPherson, Jr.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNPUBLISHED

No. 78-1402

Blanche Harris and Leon L. Moore, Jr., Trading as Leon L. Moore Oil Company, Appellants,

-v-

Atlantic-Richfield Company, Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Franklin T. Dupree, Jr., District Judge.

Argued March 5, 1979 Decided March 23, 1979

Before BUTZNER and PHILLIPS, Circuit Judges, and ROBERT R. MERHIGE, JR., United States District Judge for the Eastern District of Virginia, sitting by designation.

John C. Randall (Randall, Yaeger & Woodson on brief) William V. McPherson, Jr. (Upchurch, Galifianakis & McPherson on brief) for appellants; Richard W. Ellis (Ben F. Tennille, Smith, Moore, Smith, Schell & Hunter; John F. McLaren on brief) for appellee.

PER CURIAM:

Blanche Harris and Leon L. Moore, Jr., trading as Leon L. Moore Oil Company, appeal from a grant of summary judgment in their action against Atlantic Richfield Company for breach of contract, fraud, violation of anti-trust laws, and violation of the North Carolina unfair trade practice statutes. We find no ground for reversal in their assignments of error. Consequently, we affirm for reasons adequately stated by the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WASHINGTON DIVISION

Civil No. 768

BLANCHE HARRIS and LEON L. MOORE, JR.,
trading as LEON L. MOORE OIL COMPANY,
Plaintiffs,

vs.

ATLANTIC-RICHFIELD COMPANY,
Defendants.

MEMORANDUM OF DECISION

This action was originally instituted in this court on April 28, 1972 on a complaint alleging the breach by defendant oil company of three written contracts covering the sale by defendant oil company of petroleum products to the plaintiffs, for resale in their business as distributors of such products. For the next year and a half while the parties apparently negotiated for a settlement of their differences relating to these contracts the defendant's time for filing answer was repeatedly extended for periods of ninety days each. When settlement negotiations failed the defendant filed its answer on September 6, 1974.

Thereafter plaintiffs' original counsel withdrew and were replaced by plaintiffs' present counsel whose motion to file an amended complaint was allowed by the court as of January 15, 1975. The amended complaint asserted three causes of action: (1) breach of the three distribution contracts; (2) violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2; and (3) a treble damage action under the North Carolina Unfair Trade Practices Act, N.C.G.S. 75-1 *et seq.* In its answer filed shortly thereafter the defendant denied the allegations of plaintiffs' complaint and asserted a counterclaim for the sum of

$189,626.23, allegedly owed defendant by plaintiffs on open account for goods sold and delivered. Thereafter the defendant filed a motion for summary judgment on its counterclaim which was referred to the United States Magistrate for consideration and a report to the court with his recommendation.

Shortly before the scheduled trial of the case the defendant on February 18, 1977 filed a motion for summary judgment as to each of the three causes of action alleged in plaintiffs' complaint, the motion being accompanied by supporting affidavits and a memorandum of law. Trial of the case was continued pending hearing and determination of this motion. Meanwhile the Magistrate had filed a memorandum recommending allowance of defendant's motion for summary judgment on its counterclaim.

Defendant's summary judgment motion came on for hearing on Aujgust 5, 1977, at which time the court accepted for filing the plaintiffs' response to defendant's motion notwithstanding it was then more than four months overdue under the rules of the court. The defendant was allowed time in which to file a reply memorandum which it promptly did, but in the weeks that followed the court was inundated with a half dozen or more new affidavits to which there were attached hundreds of pages of printed materials, charts, correspondence, etc., which the court was asked to consider in connection with plaintiffs' opposition to defendant's motion for summary judgment. Although under no obligation to do so, the court has, as time has permitted, read and considered this voluminous material, the massive record previously compiled through discovery and the case authorities and legal arguments submitted by counsel, and the motion can now be decided.

PLAINTIFFS' CAUSES OF ACTION

1. The Breach of Contract Claim.

On April 21, 1967, plaintiffs and defendant entered into three written contracts, one each for the purchase by plaintiffs from defendant of gasoline, heating oil and automotive lubricants. The contracts required plaintiffs to purchase a minimum amount of each of these products annually and required the defendant to supply plaintiffs certain

maximum amounts if requested. Each written contract contained a merger clause providing in substance that the instrument embodied the whole agreement between the parties and that there were no oral agreements or conditions inducing the execution of or qualifying the terms of the contracts. The contracts gave plaintiffs the right to use defendant's trade name and trademarks and with respect to one of the contracts defendant was obligated to accept assignment of accounts resulting from credit card sales.

In 1971 the defendant's proposal to effect a merger with the Sinclair Oil Company having been frustrated by federal governmental action, the defendant determined that it would be in its best economic interest to withdraw from doing business in certain states including North Carolina. In this connection the defendant closed its oil terminal facility at Wilmington, North Carolina and ceased advertising its products in this state. Subject to certain regulations of the Federal Energy Administration which have become effective since the execution of the contracts between plaintiffs and defendant the defendant has nevertheless continued to supply petroleum products to the plaintiffs in compliance with the three contracts, has allowed plaintiffs to continue the use of its name and trademarks and has complied with the credit care requirements of the contracts.

It thus appears that the defendant is continuing to comply with the principal requirements of the three written contracts, a fact which plaintiffs have not controverted by evidence satisfying the requirements of Rule 56, F.R.Civ.P., and we look, therefore, to plaintiffs' complaint to ascertain what other acts or omissions of the defendant are alleged to have been violative of the agreements. It is observed first that plaintiffs allege "the major inducement and cause for the plaintiffs entering the fifteen (15) year long term contracts attached to this complaint" were representations by defendant "that it was entering into a new and aggressive marketing program throughout the United States, and specifically in North Carolina, and in the areas and territories to be served by the plaintiffs;" "that advertising programs for ARCO products would be expanded, enlarged, and made extremely effective;" and "that the defendant was going to enter into an expanded program of credit card distribution which would directly benefit the plaintiffs."

These allegations and any evidence which plaintiffs might produce in support thereof cannot avail the plaintiffs in the face of the merger clauses in the contracts. *Craig v. Texaco, Inc.*, 218 F.Supp 789 (E.D.N.C. 1963), *aff'd*, 326 F.2d 971 (4th Cir. 1964).

While plaintiffs' allegations that following the execution of the contracts the defendant encouraged the plaintiffs "to invest large sums of money in marketing facilities" and to purchase additional expensive equipment may indicate that defendant had every intention of expanding its business in North Carolina, it is not seen how such allegations, if true, could in any way constitute a breach of the contracts in question.

The gravamen of plaintiffs' cause of action for breach of contract is thus reduced to the allegations that defendant's decision to withdraw from doing business in North Carolina and to close its Wilmington port distribution facility violated the three written agreements.[1] Defendant does not deny its withdrawal from its marketing operations in the south-eastern United States nor that it closed its Wilmington distribution facility. The difficulty with plaintiffs' position with respect to these two allegations is that there are no terms or conditions in the written agreements requiring defendant to do business in North Carolina with anyone other than plaintiffs nor to maintain a terminal facility at Wilmington. Insofar as the complaint undertakes to allege a cause of action based on these two facts it does not state a claim upon which relief can be granted.

Apparently recognizing the tenuity of their position in this respect the plaintiffs have undertaken for the first time in their response to defendant's summary judgment motion filed at the time of hearing to characterize defendant's actions as fraudulent. The complaint, however, simply alleges "that the statements of the officials of the defendant company together with the aforesaid actions constitute a

1. Plaintiffs also alleged in paragraph 14 of the complaint that defendant "eliminated all credit card sales" and "persistently and consistently demanded that the plaintiffs cease and desist from operating under the trade name 'ARCO'," but it is elementary that a party opposing summary judgment may not rely on the unsworn allegations of his complaint, and as we have seen, defendant's affidavits that it is continuing to honor plaintiffs' credit card sales and plaintiffs are continuing to use defendant's trademarks are unrefuted on this record.

breach of contract between the plaintiffs and the defendant," and nowhere in the complaint does the word "fraud" appear. Certainly it falls far short of compliance with the provisions of Rule 9, F.R.Civ.P., which requires that the circumstances constituting fraud shall be alleged with particularity. Likewise unavailing are plaintiffs' attempts in their response to expand the terms of their contractual arrangements with defendant by including therein oral agreements and representations. This simply cannot be done in the face of the merger clause which appears in each of the three contracts. *Craig v. Texaco, Inc., supra.*

Having failed to establish the existence of a genuine issue as to any material fact tending to establish a breach of these contracts, defendant's motion for summary judgment as to plaintiffs' first claim for relief must be allowed.

2. **The Sherman Antitrust Claim.**

Plaintiffs' second claim for relief after incorporating the breach of contract claim by reference alleges simply in one paragraph the following:

> "23. That the plaintiffs are informed and beliefe that the action of the defendant in withdrawing from the southeastern states and ceasing to do business therein was taken for the purpose of dividing the market for petroleum products in order to reduce competition and raise prices, and constitutes a violation of Title 15, United States Code, §§ 1, 2 and 13(d) and (e)."[2]

As a further defense in its answer the defendant moved to dismiss plaintiffs' antitrust claims on the fround that the complaint fails to state a claim cognizable under the Sherman Act. The court is of opinion that the above-quoted allegation taken in conjunction with the allegations of the breach of contract claim probably do not state a claim upon which relief can be granted under the antitrust laws, but

2. Plaintiffs have abandoned any claim based on violations of the Robinson-Patman Act, 15 U.S.C. §§ 13(d) and (e), and discussion will therefore be confined to Sections 1 and 2 of the Sherman Act.

the court has chosen to ground decision on defendant's summary judgment motion and has concluded that the motion must be allowed.

To establish a violation of Section 1 of the Sherman Act a plaintiff must allege and prove a contract, combination or conspiracy between two or more parties to restrain trade. Neither in their allegations nor their proof have plaintiffs named a co-conspirator nor is there any allegation or proof of a contract or combination between the defendant and any other party concerning the reasons for defendant's withdrawal from doing business in the Southeastern states. Defendant, on the other hand, has filed sworn affidavits establishing sound, legitimate business reasons for taking this action, and their sworn statements remain unrefuted on this record. In their depositions the plaintiffs concede that they have no personal knowledge of any agreement or conspiracy between defendant and any other party, and the closest they come to substantiating the "information and belief" on the basis of which the antitrust charge has been alleged in the complaint is their reference to certain newspaper stories. Such evidence, of course, is not admissible for consideration in opposition to a summary judgment motion.

Plaintiffs' claimed violation of Section 2 of the Sherman Act must fail for the same reasons and the additional reason that plaintiffs have offered no evidence tending to show that defendant possesses monopoly power or the power to fix prices or exclude competition. On the contrary, in response to one of plaintiffs' interrogatories defendant has established that its share of the market for gasoline sales in North Carolina was less than three per cent at all tiemes relevant here. As a matter of law such a small share of the market could not give rise to "a dangerous probability" that monopolization could be achieved by the defendant.

It follows that defendant's motion for summary judgment on the antitrust claims must be allowed.

3. **The Unfair Trade Practice Claim.**

After incorporating their first and second claims for relief by reference plaintiffs alleged as a third claim for relief:

> "25. That the aforesaid action of the defendant in withdrawing from operation from the southeastern states in violation of existing contracts constitutes an unfair trade practice under the North Carolina General Statutes § 75-1 and subsequent sections."

As we have seen, defendant's withdrawal from doing business in the southeastern states did not constitute a violation of its contracts with the plaintiffs, but even so plaintiffs' third claim for relief is barred by the one-year statute of limitations, N.C.G.S. § 1-54(2), which requires actions "upon a statute, for a penalty . . ." to be brought within one year after the claim arises. N.C.G.S. § 75-1 which allows for the recovery of damages for treble the amount fixed by the verdict is considered in this circuit to be an action for a penalty and thus governed by this one-year statute of limitations. *North Carolina Theatres, Inc. v. Thompson*, 277 F.2d 673 (4th Cir. 1960); *Thomas v. Petro-Wash, Inc.*, 429 F.Supp. 808 (M.D.N.C. 1977). In the latter case, Judge Eugene Gordon, citing *North Carolina Theatres v. Thompson*, said:

> "The North Carolina statute of limitations in an action for treble damages under the North Carolina antitrust laws in one year. N.C.Gen.Stat. § 1-54."

Plaintiffs have filed an additional brief calling the court's attention to the provisions of 15 U.S.C. § 16(i) which provides for the tolling of the statute of limitations in respect of every private or state right of action arising under the antitrust laws during the pendency of a civil or criminal proceeding instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, and have filed an affidavit showing the pendency at this time of a proceeding before the Federal Trade Commission involving antitrust allegations made against the defendant herein and seven other oil companies. It appears, however, that the FTC proceeding was not instituted until July of 1973 at which time the statute of limitations had already barred plaintiffs' cause of action under N.C.G.S. § 75-1 and was no longer subject to tolling.

In summary, the court has been unable to find that there exists a genuine issue as to any material fact with respect to either of plaintiffs' three claims for relief, and defendant's motion for summary judgment as to each of the claims must be allowed.

DEFENDANT'S COUNTERCLAIM

While some question was raised as to the authority of the United States Magistrate under existing law to make his recommendation that defendant's motion for summary judgment on the counterclaim be allowed, in this court the plaintiffs have not resisted the allowance of the motion as to the counterclaim but have simply asked that final judgment be withheld until plaintiffs' claims have been disposed of. In view of the disposition of these claims made herein defendant's motion will be allowed and judgment will be entered for the defendant in the amount prayed for, $184,396.97, with interest.[3]

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

March 23, 1978.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

3. The counterclaim was originally for $189,626.23, but defendant was allowed by an amendment to reduce the claim to $184,396.97, and it is this latter sum which plaintiffs concede is due and owing.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WASHINGTON DIVISION**

BLANCHE HARRIS and LEON L. MOORE, JR.,
Trading as LEON L. MOORE OIL COMPANY,
Plaintiffs,

vs.

ATLANTIC-RICHFIELD COMPANY,
Defendant.

Civil No. 768

JUDGMENT

For the reasons stated in the court's memorandum of decision this day filed, the motion of defendant for summary judgment as to each of plaintiffs' claims for relief is allowed and defendant's motion for summary judgment on its counterclaim is allowed. It is, therefore,

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiffs are not entitled to recover of the defendant by reason of any matters alleged in the amended complaint and that the same be and is hereby dismissed.

2. That the defendant have and recover of plaintiffs the sum of ONE HUNDRED EIGHTY-FOUR THOUSAND, THREE HUNDRED NINETY-SIX and 97/100THS ($184,396.97) DOLLARS, together with interest thereon from May 17, 1976, the date on which defendant filed an amendment to the counterclaim establishing this as the agreed amount of plaintiffs' indebtedness to the defendant.

3. That the plaintiffs pay the costs.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

March 23, 1978.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1402

BLANCH HARRIS and LEON L. MOORE, JR., Trading as LEON L. MOORE OIL COMPANY,

Appellants,

versus

ATLANTIC-RICHFIELD COMPANY,

Appellee.

ORDER

Upon consideration of the appellants' petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Butzner for a panel consisting of Judge Butzner, Judge Phillips, and Judge Merhige (United States District Judge).

For the Court,

/s/ William K. Slate, II

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-127

BLANCHE HARRIS and LEON L. MOORE, JR.,
trading as LEON L. MOORE OIL COMPANY,
Petitioners

V.

ATLANTIC RICHFIELD COMPANY,
Respondent

On Petition for A Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNSEL FOR RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioners

V.

ATLANTIC RICHFIELD COMPANY,
Respondent

On Petition for A Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Atlantic Richfield Company, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the United States District Court for the Eastern District of North Carolina granting respondent's motion for summary judgment, which decision was affirmed *per curiam* by the United States Court of Appeals for the Fourth Circuit.

Statement of the Case
Proceedings Below

This action was commenced by petitioners on April 28, 1972. In their initial complaint, petitioners essentially alleged anticipatory breaches of three written contracts which had been entered into in April, 1967. In December, 1974, after Atlantic Richfield Company (hereinafter "Atlantic Richfield") filed answer and counterclaim, petitioners filed a motion to amend the complaint to assert two additional claims; (1) violation of Section 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and 13(d) and (e) of the Robinson-Patman Act; and (2) violation of the North Carolina Unfair Trade Practices Act, North Carolina General Statute §75-1, *et seq.* By order filed on February 5, 1975, the district court granted petitioners' motion to amend, Atlantic Richfield again answered and counterclaimed. Extensive discovery ensued and was completed.

On February 19, 1976, Atlantic Richfield filed a motion for summary judgment on its counterclaim. On February 22, 1977, Atlantic Richfield filed a

motion for summary judgment on the matters alleged in petitioners amended complaint. On August 5, 1977, the day of the final pretrail conference and hearing on Atlantic Richfield's motion, petitioners filed a reply brief and two affidavits, one by petitioners' attorney and one by the attorney's secretary. Atlantic Richfield filed its responsive brief on August 12, 1977. Beginning on that same day, petitioners parcelled out more affidavits, attaching thereto photocopied and uncertified pages from various publications, clippings and assorted papers.

On March 23, 1978, the district court entered its Memorandum of Decision and Judgment granting both Atlantic Richfield's motion for summary judgment as to the matters alleged in petitioners' amended complaint and its motion for summary judgment on the counterclaim.[1]

Petitioners appealed and the United States Court of Appeals for the Fourth Circuit affirmed *per curiam* on March 23, 1979.

Statement of Facts

This action arose out of the decision by Atlantic Richfield, in May 1971, to withdraw from marketing

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[1]Atlantic Richfield's counterclaim was based upon petroleum products sold and delivered to but not paid for by petitioners. Petitioners have not appealed from the district court's entry of judgment in favor of Atlantic Richfield on its counterclaim in the amount of $184,396.97 plus interest.

operations in the Southeast United States. When the decision was announced, Atlantic Richfield and petitioners were parties to three written agreements, which had been entered into in April 1967, under which petitioners were designated the exclusive distributor of Atlantic products in a specific territory and Atlantic Richfield agreed to supply and petitioners agreed to purchase certain amounts of gasoline, fuel oil and automotive lubricants. Each of the three agreements was to run for fifteen years.

In 1967, Atlantic Richfield's market position in North Carolina and the Southeast was weak. In 1968, Atlantic Richfield attempted to improve its market share by merging with Sinclair Oil Corporation. However, in January 1969, the United States Department of Justice filed suit against Atlantic Richfield and Sinclair to block the proposed merger, and obtained an injunction which preliminarily enjoined the merger. Subsequently Atlantic Richfield was allowed to proceed with the merger only upon compliance with an Order that it dispose of Sinclair's properties in the Southeast. By this decree, Atlantic Richfield was compelled to abandon the only effective, feasible method it had for increasing its market share and profitability in the region. After conducting a comprehensive retail market study in 1970, Atlantic Richfield concluded that its market share and profit position in the Southeast were unsatisfactory and could not be improved. In May of 1971, Atlantic Richfield announced that it was withdrawing from marketing operations in the Southeast United States. Atlantic Richfield's decision to withdraw was

unilateral, made in good faith, and based upon sound business reasons.

Following the announcement of its intended withdrawal Atlantic Richfield continued to honor its contractual obligations to petitioners. Subject to certain regulations of the Federal Energy Administration, (now the Department of Energy), Atlantic Richfield continued to supply petroleum products to petitioners in accordance with its three contracts and continued to comply with the credit card requirements of the contracts.[2]

Argument

(A) NO IMPORTANT FEDERAL OR PUBLIC QUESTION, CONFLICT WITH THE DECISIONS OF THIS COURT OR CONFLICT WITH STATE LAW IS INVOLVED HERE.

The Petition merely attempts to obtain a further review of the district court's determination, affirmed *per curiam*, that petitioners failed to establish the

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[2]Atlantic Richfield continued to honor its contractual obligations to petitioners until August 1978, when the Department of Energy, at petitioners' request, approved petitioners' application to terminate their relationship with Atlantic Richfield and to be supplied by Cities Service.

existence of a genuine issue of material fact in order to withstand Atlantic Richfield's motion for summary judgment. No important federal or public question is involved. Nor is there any conflict with any decision of this Court. In each of this Court's decisions cited by petitioners at pages 9 and 10 of the Petition, there was a finding of significant probative evidence to support the alleged antitrust conspiracy. However, petitioners presented no such evidence in this case. See discussion, *infra* at pages 9 to 11.

The decision of the district court is also not in conflict with state law. Every federal court decision on point has applied North Carolina's one year statute of limitations, as set forth in N.C. Gen. Stat. §1-54 to the North Carolina Unfair Trade Practices Act, N.C. Gen. Stat. §75-1.1 *et seq. North Carolina Theatres, Inc. v. Thompson*, 277 F.2d 673, 676 (4th Cir. 1960); *Thomas v. Petro-Wash, Inc.* 429 F.Supp. 808, 813 (M.D.N.C. 1977); and *CF Industries v. Transcontinental Gas Pipeline*, 448 F.Supp. 475, 486 (W.D.N.C. 1978). There is no decision of the Supreme Court of North Carolina applying any statute of limitations to a Chapter 75 claim. The court's dictum in *State ex rel Edmisten v. J.C. Penny Co.*, 292 N.C. 311, 233 S.E. 2d 895 (1977) quoted at page 11 of the petition, did not address the application of any state statute of limitations to a Chapter 75 claim. In any event, petitioners failed to present any evidence of a violation of Chapter 75 by Atlantic Richfield.

(B) THE DISTRICT COURT DID NOT ERR IN GRANTING ATLANTIC RICHFIELD'S MOTION FOR SUMMARY JUDGMENT.

(1) There are no genuine issues of material fact tending to establish a breach of any contract by Atlantic Richfield

In their amended complaint, petitioners alleged that Atlantic Richfield breached three written agreements for the sale of petroleum products by (1) eliminating all credit card sales, (2) closing the Wilmington, North Carolina, distribution facility, and (3) announcing its withdrawal from the Southeast in 1971.

With respect to the credit card question, there was no genuine issue of material fact with respect to Atlantic Richfield's compliance with the contract requirements. The agreement provided that Atlantic Richfield would accept petitioners' assignments of retail credit sales. Atlantic Richfield produced sworn evidence that it had continued to do so and petitioners produced no counter affidavits. Indeed, petitioner Blanche Harris testified that if anyone wanted to use a credit card at any one of petitioners' stations, they could. Thus, the district court properly concluded that Atlantic Richfield had complied with its contract requirements regarding credit cards.

Petitioners' arguments with respect to the announcement of cessation of marketing operations in the

Southeast and the closing of Atlantic Richfield's Wilmington distribution facility are equally unavailing. The 1971 announcement of intended withdrawal was not disputed nor did Atlantic Richfield dispute that in 1973 it closed its Wilmington distribution facility. However, the written contracts contained no terms or conditions which required Atlantic Richfield to continue to do business in the Southeast United States or maintain any distribution facility in Wilmington, North Carolina. The contracts only required that Atlantic Richfield sell to petitioners the gallons of petroleum products called for in the agreements. This was consistently done until petitioners voluntarily changed sources of supply in August of 1978. Thus, there are no facts, disputed or undisputed, establishing a breach of contract by Atlantic Richfield.

(2) There is no genuine issue of material fact tending to establish that Atlantic Richfield violated Section 1 of the Sherman Act.

Petitioners' entire allegation on the antitrust claim, set forth in Paragraph 23 of the amended complaint, reads as follows:

> That the Plaintiffs are informed and believe that the action of the Defendant in withdrawing from the southeastern states and ceasing to do business therein was taken for the purpose of dividing the market for petroleum products in order to reduce

> competition and raise prices, and constitutes a violation of Title 15, United States Code, § 1, 2 and 13(d) and (e).
>
> Amended Complaint,
> Paragraph 23

Although the district court indicated that petitioners had failed to state a claim for violation of Section 1 of the Sherman Act in their pleadings, the Court chose to ground its decision on Atlantic Richfield's motion for summary judgment.[3]

At their depositions, petitioners conceded that they had no personal knowledge of any agreement or conspiracy between Atlantic Richfield and any other party. In addition, Atlantic Richfield produced affidavit testimony denying any alleged conspiracy and detailing its independent business reasons for withdrawing from the southeast states. The burden thus shifted to petitioners to produce "significant probative evidence" of a conspiracy in violation of Section 1 of the Sherman Act. *E.g., First National Bank of Arizona v. Cities Service* 391 U.S. 253, 289, 88 S.Ct. 1575, 1592-93, 20 L.Ed.2d. 569, 593 (1968); *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1192 (5th Cir. 1978); *Scranton Construction Company, Inc. v. Litton Industries Leasing Corp.*, 494 F.2d 778, 782 (5th Cir. 1974).

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[3]The petitioners have abandoned their claims under the Robinson-Patman Act and Section 2 of the Sherman Act.

Petitioners failed to fulfill that obligation.

Petitioners argue that the transcript of an appearance by a former federal official before a House of Representatives subcommittee, an uncertified copy of a preliminary staff report of the Federal Trade Commission ostensibly prepared for a Senate subcommittee and an opinion of an assistant professor at Duke University constitute significant probative evidence to justify denial of Atlantic Richfield's motion for summary judgment on the antitrust claim. This material does not constitute significant probative evidence of any conspiracy. Federal Rule of Civil Procedure 56(e) requires opposing affidavits to be made on personal knowledge, to set forth affirmatively the affiant's competency to testify to the matters stated, and to set forth facts which should be admissable in evidence. Documents attached to affidavits must be sworn to or certified. The transcript of John W. Wilson's testimony before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the United States House of Representatives and the preliminary staff report of the Federal Trade Commission were clearly inadmissable. The fact that they were attached to affidavits of petitioners' counsel does not satisfy the requirements of Rule 56(e). See, *e.g., United States v. Dibble,* 429 F.2d 598, 602 (9th Cir. 1970); *Antonio v. Barnes,* 464 F.2d 584 (4th Cir. 1972); *Monroe v. Board of Education of Town of Wolcott, Conn.*, 65 F.R.D. 641 (D. Conn. 1975); *Henkin v. Rockower Bros., Inc.*, 259 F. Supp.

202 (S.D.N.Y. 1966); *Hotel and Restaurant Employees' Alliance, Etc. v. Allegheny Hotel Co.*, 374 F.Supp. 1259, 1263 (W.D. Pa. 1974); and *Walpert v. Bart*, 280 F.Supp. 1006, 1010 (D. Md. 1967), aff'd., 390 F.2d 877 (4th Cir. 1968).

Petitioners' tactic of trying to salvage their antitrust case by relying on an opinion which is based solely on speculation and hypothesis and is unsupported by evidence in the record is not a new one. In *Merit Motors, Inc. v. Chrysler Corporation*, 569 F.2d 666, 672-673 (D.C. Cir. 1977), the Court held that to withhold summary judgment against a party who relies solely on an expert's opinion that has no more basis in or out of the record than theoretical speculation would seriously undermine the policies of Rule 56 of the Federal Rules of Civil Procedure. The Court stated: "We are unwilling to impose the fruitless expenses of litigation that would result from such a limitation on the power of a court to grant summary judgment." 569 F.2d, *supra*, at 673. The affidavit of Dr. James Scheiner relied upon by petitioners is incompetent and speculative. As appears from the affidavit itself, Dr. Scheiner's roundhouse and conclusory opinions are not based upon personal knowledge but on what he perceives to be but does not specify as the history, business associations and reputations of the major oil companies. Dr. Scheiner's affidavit illustrates the petitioners' total failure to produce any probative evidence of the alleged conspiracy. Dr. Scheiner was identified to defendant in Plaintiff's Answers to Interrogatories, Plaintiff's Supplemental Answers to Interrogatories, and in two "Pretrial Statements" filed by plaintiff

as an expert witness *on damages only.* He was deposed as such during the discovery period. Only after Atlantic Richfield's motion for summary judgment was argued and all briefs filed did petitioners proffer Dr. Scheiner's opinion in a futile effort to avoid summary judgment.

(C) PETITIONERS' ASSERTION THAT THE DISTRICT COURT DID NOT READ THE MATERIALS SUBMITTED ON THEIR BEHALF IS PATENTLY FALSE.

The weakness of petitioners' case is further demonstrated by their unjustifiable attack on the integrity of the district court. Petitioners assert that there has been a departure from the accepted and usual course of judicial proceedings in that they "infer" that the district court did not read the material submitted on their behalf in opposition to Atlantic Richfield's motion for summary judgment. Petitioners assert:

> The trail Court stated that the antitrust material submitted by the petitioners in opposition to the respondent's summary judgment motion were read ". . . as time has permitted . . ." From this statement, and from the trial Court's erroneous statements regarding the substance of the evidence in the record, an inference arises that the Court did not read or consider the material submitted in opposition to Atlantic's summary judgment motion.

> In this posture, the case stands for the proposition that if a court has not the time to read the materials the plaintiff must lose.
>
> (Pet. P. 10)

The district court held:

> Defendant's summary judgment motion came on for hearing on August 5, 1977, at which time the court accepted for filing the plaintiffs' response defendant's motion *notwithstanding it was then more than four months overdue under the rules of the court.* The defendant was allowed time in which to file a reply memorandum which it promptly did, *but in the weeks that followed the court was inundated with a half dozen or more new affidavits to which there were attached hundreds of pages of printed materials, charts, correspondence, etc., which the court was asked to consider in connection with plaintiffs' opposition to defendant's motion for summary judgment. Although under no obligation to do so, the court has, as time has permitted, read and considered this voluminous material,* the massive record previously compiled through discovery and the case authorities and legal arguments submitted by counsel, and the motion can now be decided. (Emphasis supplied.)
>
> (Pet. App. B 2)

To infer that the district court did not read the materials submitted by petitioners when the opinion specifically states that the materials had been read (despite the repeated failure of petitioners' counsel to comply with the local rules) does the district court a grave injustice.

Conclusion

Petitioners had unlimited discovery to develop their case. Despite the compilation of a massive record, petitioners were unable to come forward with any evidence to support the allegations in their amended complaint. They should not be permitted "to get to a jury on the basis of the allegations in their complaint, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations . . . . " *First National Bank of Arizona v. Cities Service*, 391 U.S. 253, 290, 88 S. Ct. 1575, 1593, 20 L. Ed. 2d 569 (1968).

No issue of any importance warrants review by this Court and, therefore, the petition for certiorari should be denied.

Respectfully submitted,

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